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MICHAEL

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1973
Nos. 1377 and 1378

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, *Petitioner*,

v.

CITY OF NEW YORK, *et al.*, *Respondents.*

and

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, *Petitioner*,

v.

CAMPAIGN CLEAN WATER, INC., *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE FOURTH CIRCUIT

AMICI CURIAE BRIEF FOR THE STATE OF WASHINGTON AND COMMONWEALTH OF PENNSYLVANIA

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AMICI CURIAE BRIEF FOR THE STATE OF WASHINGTON AND COMMONWEALTH OF PENNSYLVANIA

The State of Washington and the Commonwealth of Pennsylvania, by and through their Attorney Generals, file this Amici Curiae brief under Rule 42(4) of this Court.

STATEMENT OF THE INTERESTS OF THE AMICI CURIAE

All who are acquainted with the State of Washington know that its lifeblood is closely associated with two water bodies (1) the mighty Columbia River—which enters the Northeast corner of the state from British Columbia and snakes through the eastern half of the state until it turns west as the border between Oregon and Washington and discharges at Washington's Southwest corner into the Pacific Ocean; and (2) Puget Sound—a large arm of the Pacific Ocean which flows on tidal cyclic basis deep into western Washington.

The total livability of the state is dependent primarily on the quantity and quality of these waters and their tributaries. Not only are they valuable for navigation, both commercial and recreational, but fish and wildlife use them for homes, food sources and resting areas. They are also of the greatest import for their scenic and aesthetic values. And, in the case of the Columbia, hydroelectric power production and agricultural irrigation uses are most important. It is fair to conclude that the environment of Washington State, including the essential character of its citizens, is determined largely by the condition of the Columbia River and Puget Sound and their associated waters.

The Commonwealth of Pennsylvania's posture, with respect to Lake Erie, the Delaware and Susquehanna Rivers and numerous other water bodies, is

not dissimilar from that of the State of Washington.

Recognizing the importance of its water resources, the government of the State of Washington has taken a number of very significant steps to protect these priceless resources. This has been especially true with regard to their quality.

Twenty-nine years ago, the Washington State Legislature enacted the state's basic water pollution control act. Chapter 216, Laws of 1945, now codified in Chapter 90.48 RCW. The Legislature has periodically reviewed this statute and added provisions to improve its effectiveness as a vehicle for water pollution abatement.[1] Of significance to this case are the provisions of Chapter 90.48 RCW which set forth clear policies of cooperation and coordination in the implementation of state and federal water pollution efforts in the State of Washington. RCW 90.48.153 and RCW 90.48.260.[2]

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[1]The major amendments to Chapter 90.48 RCW took place in 1955 (Chapter 71, Laws of 1955), 1967 (Chapter 13, Laws of 1967) and 1973 (Chapter 155, Laws of 1973).

The latest expression of general state water policy is contained in the Water Resources Act of 1971. Now codified in Chapter 90.54 RCW, RCW 90.54.020(3) sets forth a "fundamental" of management policy for the state's waters in these words:

> The quality of the natural environment shall be protected and, where possible, enhanced as follows:
>
> (b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

See RCW 90.52.040 also enacted in 1971.

[2]RCW 90.48.010, enacted in 1945 and amended in 1973, provides:

> It is declared to be the public policy of the State of Washington

The executive branch of Washington State government has also promoted effective federal-state coordination of the various efforts of government to eliminate water pollution in Washington. During 1971 and 1972 the Committee on Public Works of both the United States Senate and House of Representatives engaged in extensive and intensive examinations of the need for changes in the Federal Water Pollution Control Act. P.L. 92-500. The state's executive branch presented its views at various times during the course of these Congressional activities. The high point of the state's efforts to influence the development of this federal legislation was the per-

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to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state. The state of Washington in recognition of the federal government's interest in the quality of the navigable waters of the United States, of which certain portions thereof are within the jurisdictional limits of this state, proclaims a public policy of working cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers to insure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington.

RCW 90.48.153, enacted in 1949, provides:

The commission is authorized to cooperate with the federal government and to accept grants of federal funds for carrying out the purposes of this chapter. The commission is empowered to make any application or report required by an agency of the federal government as an incident to receiving such grants.

RCW 90.48.260, enacted in 1967 and amended in 1973, provides:

The department of ecology is hereby designated as the State Water Pollution Control Agency for all purposes of the Federal Water Pollution Control Act as it now exists and is hereby authorized to participate fully in the programs of the act as well as to take all action necessary to secure to the state the benefits and to meet the requirements of the act . . .

sonal appearance of the state's governor, Daniel J. Evans, before the Committee on Public Works of the House of Representatives on December 7, 1971. On this occasion Governor Evans urged the committee to modify the FWPCA by:

(1) Setting forth goals of high quality for our nation's waters, including the elimination of water pollution by 1985;

(2) Establishing a strong regulatory program —the heart being a national waste discharge permit program coupled with appropriate civil and criminal sanction provisions;

(3) Providing a federal funding program to finance the construction of public sewerage abatement facilities;

(4) Creating a joint federal-state effort against water pollution which, rather than eliminating one government from the fight, encourages the utilization of the best talents of both federal and state governments.

The Commonwealth of Pennsylvania has followed a course of action within its legislative process which is not dissimilar to that taken by the state of Washington, in that the Commonwealth of Pennsylvania has statutorily recognized the need to purify and preserve its limited water resources. The Department of Environmental Resources has been given the power and duty to implement Pennsylvania's policy with regard to conserving and purifying Pennsylvania's water resources. Pennsyl-

vania's Department of Environmental Resources Act of December 3, 1970, P.L. 834, 71 P.S. § 510-1 et seq.

To insure that the State of Washington would be in a position of participating fully in the various programs contemplating federal-state cooperation in their implementation contained in the Federal Water Pollution Control Act Amendments of 1972, the legislature of the State of Washington in March, 1973, five months after enactment of the federal legislation, enacted Chapter 155, Laws of 1973. This legislation provided full authority for the executive branch of the State of Washington to participate in all of the federal-state programs of the new federal legislation.

In addition, anticipating receipt of the share of the federal funds authorized for allocation to the state of Washington for use in financing of public sewerage abatement and control facilities on a matching arrangement with state and local governments, the electorate of the State of Washington, at the general election of November, 1972, approved a referendum authorizing the sale of state general obligation bonds totaling $225,000,000 and the use of the proceeds in assisting in the financing of public water pollution control facilities and solid waste facilities. Chapter 127, Laws of 1972, 2nd Ex. Sess.

The total needs, in terms of dollars for water pollution control facilities by public entities in the

State of Washington, under both federal and state laws and as determined by the United States Environmental protection Agency, to meet the 1977 requirements of the Federal Water Pollution Control Act, is estimated to be $1,078,715,110.

Under the allocation formulas provided in Section 205 of the Federal Water Pollution Control Act as applied to funds authorized under Section 207 of the same act, the state of Washington is entitled to a total of $211,300,000 consisting of $44,500,000 for fiscal year 1973, $53,400,000 for fiscal year 1974, and $113,400,000 for fiscal year 1975. By regulations dated December 9, 1972, and January 15, 1974, the Administrator of the United States Environmental Protection Agency allotted to the state of Washington $17,800,000 for fiscal year 1973, $26,-700,000 for fiscal year 1974, and $64,700,000 for fiscal year 1975.

Unless the full amount of federal funds is provided for use by public entities in Washington State, there is no reasonable possibility that the facilities required to be constructed by 1977 to meet federal and state water pollution control treatment and receiving water standards will be constructed. Further even if the full amounts are ultimately provided to the state of Washington, the 1977 requirements for water pollution control cannot be substantially achieved unless the funds Congress intended for allocation by the United States Environmental Protection Agency are provided to the state in such a

manner as to allow the commitment of funds and construction of facilities begun during fiscal year 1975.

The Commonwealth of Pennsylvania is presently holding approximately 530 applications by municipalities to secure funding of their water quality control programs under the Water Pollution Control Act Amendments of 1972. Almost all of these applicants have completed plans and specifications for their projects, with a total cost estimated at $1.5 billion and are generally ready to proceed to the construction stage. Twenty percent of the applications have been pending since February of 1972, 40% since February of 1973 and 40% since February of 1974. Sixty percent of the 530 projects are necessary for the municipalities to comply with anti-pollution orders, either of the courts or of the Department of Environmental Resources. Pennsylvania's allocation of unimpounded federal construction grants for fiscal years 1973, 1974 and 1975 is approximately $493.8 million, which will fund only 141 of the 530 qualified and needed projects. The remaining applications cannot be certified for funding until and unless the impounded funds are released.

Because of their deep concern over a serious malfunction in our nation's water pollution abatement effort, the State of Washington and the Commonwealth of Pennsylvania filed an action on January 21, 1974, requesting the United States District Court for the District of Columbia to issue an order

compelling the Administrator to allot the full sum Congress authorized to be appropriated for the construction of publically owned treatment works as provided in Sections 205 and 207 of the Act.[3] Since that time, some twenty-one additional states have successfully intervened in said action.[4] The combined interest of the plaintiffs and interveners in said suit represents approximately one-third of all of the impounded or unallotted funds for fiscal years 1973, 1974, and 1975.

STATEMENT OF THE CASE

The cases before this court have as their subject matter the issue of statutory construction to determine the extent of discretion, if any, granted to the Administrator of the United States Environmental Protection Agency (hereinafter the Administrator) in allotting funds among the states pursuant to the of Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500 (October 18, 1972), 86 Stat. 816, 33 U.S.C. 1251 *et seq.* (hereinafter the Act).

The facts are not in dispute. For preliminary purposes they are as follows: On October 4, 1972 the Congress passed a water pollution bill authorizing appropriations in the amount of $11,000,000,000 for waste treatment plant consruction grants for

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[3] *State of Washington et al. v. Russell E. Train*, Civil Action 74-105, United States District Court for the District of Columbia, filed January 21, 1974.

[4] Vermont, Illinois, Maryland, Colorado, Connecticut, Arizona, Idaho, Alabama, South Carolina, Iowa, Hawaii, Nevada, Oklahoma, North Dakota, Tennessee, New Jersey, Oregon, Utah, Georgia, Nebraska and Louisiana.

fiscal years 1973 and 1974. The bill was vetoed on October 17, 1972, by the President who stated that he found the measure to be of an "inflationary" nature. The next day Congress overrode the veto. On November 28, 1972, the Administrator announced that pursuant to the President's direction, he was allotting only $5,000,000,000 of the total $11,000,000,000 for treatment plant construction projects for fiscal years 1973 and 1974. It is the Administrator's announced action, which is popularly referred to under the rubric of "impoundment of funds", which is challenged in this suit. *Campaign Clean Water v. Ruckelshaus*, 361 F. Supp. 689, 5 E.R.C. 1441 (E.D. Va., 1973).

The Act begins by stating that its objective "is to restore and maintain the chemical, physical and biological integrity of the Nation's waters." Section 101(a). To achieve this objective, Congress declared as goals of the Act that "the discharge of pollutants into the navigable water be eliminated by 1985" and that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water to be achieved by July 1, 1983". Section 101(a)(1), (a). Congress unequivocally stated in the Act that "it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works." Section 101(a)(4).

Title II of the Act is entitled "Grants for Con-

struction of Treatment Works". The purpose of this title is "to require and to assist the development and implementation of waste treatment plans and practices which will achieve the goals of this Act." Section 201(a). The Administrator "is authorized to make grants to any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works." Section 201 (g) (1). Congress "authorized to be appropriated to carry out this title, * * * for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000 for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000 and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000." Section 207.

The Administrator is required by the Act to allot among the States the sums authorized to be appropriated.

> Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, *shall be allotted* by the Administrator * * * Section 205(a) (Emphasis added.)

A state's share of the authorized amounts for fiscal year 1973 and 1974 is determined by a statutory formula based on "the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears on the estimated cost of construction of all needed publicly owned treatment works in all of the States." Section 205. Allotments to the States commencing in fiscal 1975 are

to be in accordance with revised cost estimates submitted to and approved by Congress. Section 205(a).

The designated shares are to be allotted among the States by the Administrator. These allotted funds then are available for grants to construct publicly owned treatment works within the State. Section 203. An individual applicant for a grant submits plans, specifications, and estimates for each proposed project to the Administrator for his approval. Approval of the plans, specifications, and estimates by the Administrator is deemed to constitute a contractual obligation of the United States for the payment of its proportional contribution to such project. Section 203(a).

The sums allotted to a State are to continue to be available for obligation for a period of one year after the close of the fiscal year for which such sums are authorized. The allotted sums that are not obligated after the one year extension are to be "immediately reallotted by the Administrator in accordance with regulations by him, generally on the basis of the ratio used in making the last allotment of sums under this section." Section 205(b)(1).

Prior to final approval of a treatment works project, the Administrator must consider the "limitations and conditions" of Section 204. For example, the Administrator is to determine that (a) the treatment works is in conformity with any applicable State plan under Section 303(e) of the Act, (b) such works have been certified by the appropriate State

water pollution control agency as entitled to priority over such other works in the State, (c) there are adequate provisions satisfactory to the Administrator for assuring proper and efficient operation and maintenance, and (d) the size and capacity of the works relate directly to the needs to be served by the works. Section 204(a)(2), (3), (4), (5).

The Federal share of the construction costs for approved projects is 75 per centum. Section 202(a). Expenditures of allotted funds are to be made by the Administrator in the form of payments to the recipient of a grant as the work progresses and costs of construction are incurred on the project. Section 203 (b).

The case of *City of New York, et al. v. Train*, —— F.2d ——, 6 ERC 1177, 1179 (C.A.D.C. 1974) describes the funding procedures for publicly owned treatment works succinctly and accurately as follows:

> The Act was passed to insure that ultimate grantees could rely in advance on the amounts available. Section 101(a) declares that to clean the nation's waters "it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works." To this end, the Act created a funding mechanism known as "contract authority". The technical operation of the sections of the Act relating to this "contract authority" spending is at the heart of this dispute and a thorough understanding of the mechanism is, therefore, imperative.
>
> There are six distinct steps involved in funding under the Act. (1) Authorization by

Congress to appropriate funds (§ 207); (2) "allotment" of these authorized sums among the various states, pursuant to formula (§ 205); (3) review by the Administrator of project proposals submitted by a particular municipality (§§ 203, 201(g)(2) and 204); (4) "obligation" by the Administrator of the federal share of an approved project (§§ 203 and 201(g)(1)); (5) appropriation by Congress of funds to pay obligated contracts as they fall due; and (6) disbursement of the funds (§ 203(b) and (c)).

The second step is the step in controversy.

STATEMENT OF THE ISSUES

This case pertains to the allocation of funds to the various states to finance publically owned waste treatment works pursuant to Sections 205 and 207 of the Federal Water Pollution Control Act Amendments of 1972.

The issues before this court are:

(1). Whether the Administrator of the United States Environmental Protection Agency may ignore Congressional intent and the mandatory requirements of the Federal Water Pollution Control Act Amendments of 1972 by refusing to allot the full sums authorized to be appropriated by Congress.

(2). Whether the Administrator of the United States Environmental Protection Agency may exercise discretion based upon his judgmental evaluation of competing national policies, priorities, goals and objectives rather than those established by Congress under the Federal Water Pollution Control Act Amendments of 1972.

ARGUMENT—THE ADMINISTRATION OF THE ENVIRONMENTAL PROTECTION AGENCY MUST ALLOT UNDER SECTION 205(a) OF THE FEDERAL WATER POLLUTION CONTROL ACT NO LESS THAN THE FULL AMOUNT AUTHORIZED TO BE APPROPRIATED BY SECTION 207 OF THE ACT.

The Administrator has no discretion under the Act to determine the amounts to allot among the States. The Act contains mandatory language that the $5 billion and $6 billion for fiscal years 1973 and 1974, respectively "shall be allotted by the Administrator". Congress intended the full sums authorized to be appropriated to be allotted among the States. This intention is manifested in the Act as a whole and its legislative history.

If the Administrator fails to allot among the States the authorized funds, they are irretrievably lost to the States. Under Section 205(b)(1) only the sums allotted to a State continue to be available for obligation beyond the end of the fiscal year for which the sums have been authorized.

> *Any sums allotted* to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. *Such sums* shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which *such sums* are authorized * * * (Emphasis added.)

The words "such sums" refer back to "any sums allotted".

Section 205(b)(1) further provides that any

funds allotted but not obligated are to be immediately reallotted by the Administrator.

> Any *amounts so allotted* which are not obligated by the end of such one-year period *shall be* immediately *reallotted* by the Administrator * * * Such reallotted sums shall be added to the last allotments made to the states * * * (Emphasis added.)

The obvious intent of these latter provisions is to keep the money available to the States for construction projects. The Administrator has no authority under the Act to reallot funds once the end of the fiscal year is past.

The Administrator's refusal to allot frustrates the entire reallotment process. States have absolutely no opportunity to submit projects for approval and consequent obligation of the unallotted funds. Under full allotment all of the authorized funds continue to be available for obligation.[8]

The plain meaning of the language of Sections 205 and 207 is to require the Administrator to allot the full sums authorized. Section 205 provides that "[s]ums authorized to be appropriated pursuant to section 207 * * * *shall be allotted* by the Administrator * * *" The sums authorized to be appropriated under Section 207 are "to carry out" the provisions of Title II regarding grants for construction of publicly owned treatment works. The

[8]In order to prevent the possible lapse of fiscal year 1973 funds, the Plaintiff and successful interveners/Plaintiffs in *State of Washington, et al., v. Train*, Civil Action 74-105, filed on January 21, 1974 in the District Court for the District of Columbia, succeeded on June 28, 1974 in obtaining a temporary restraining order to prevent the possible lapse of $1,044,600,000.

words "not to exceed" before the authorized amounts in Section 207 establish the upper limit on the obligation of funds (not the allotment of funds) by the Administrator.

The clear intent of Congress by a reading of these sections is to require the full allotment of the authorized funds. The Court in *City of New York et al. v. Ruckelshaus*, 358 F. Supp. 669, 679 (D.D.C. 1973) succinctly stated that:

> The language of the pertinent sections of the Act, read in the light of their legislative history, *clearly indicates the intent of Congress to require the Administrator to allot, at the appropriate times, the full sums authorized to be appropriated by § 207.* Hence, this court has no choice other than to declare that § 205(a) of the Act requires the Administrator to allot among the states $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974. (Emphasis added.)

The overriding intent of Congress was to commit the Federal government to a program by providing the statutory scheme and the financial means to accomplish the task envisioned in the Act. The pertinent language of the Act and its legisaltive history clearly indicate that the Administrator must allot the *full* sums authorized to be appropriated by Section 207 of the Act.

At the time the Act was being considered, Congressman Harsha was the ranking minority member of the House Public Works Committee, which reported on the House version of the Act. He was also

the floor manager of the bill and a member of the conference committee. Congressman Harsha explained to the House the meaning of certain of his amendments to the Act.

> * * * I want to point out that the elimination of the word "all" before the word "sums" in Section 205(a) and insertion of the phrase "not to exceed" in Section 297 was intended by the managers of the bill to emphasize the President's flexibility *to control the rate of spending.* 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972) (Emphasis added.)

At a later point of the debate, a colloquy between Congressmen Jones, Ford and Harsha revealed the actual intent of the amendments.

> MR. GERALD R. FORD. Mr. Speaker. I think it is vitally important that the intent and purpose of Section 207 is spelled out in the legislative history here in the discussion on this conference report.
>
> As I understand the comments of the gentleman from Ohio [Harshal], the inclusion of the words in Section 207 in three instances of "not to exceed" indicates that is a limitation. More importantly, that it is not a mandatory requirement that in one year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure*?
>
> MR. HARSHA. I do not see how reasonable minds could come to any other conclusion than that the *language means we can obligate or expend up to that sum*—anything up to that sum but not to exceed that amount * * *
>
> MR. GERALD FORD. Mr. Speaker. I would like to ask the distinguished chairman of the subcom-

mittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio [Harsha].

MR. JONES of Alabama. My answer is "yes". Not only do I agree with him, but the gentleman from Ohio offered this amendment which we have now under discussion in the committtee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio [Harsha].

MR. GERALD R. FORD. Mr. Speaker. This clarified and certainly ought to wipe out any doubts anyone has. The language is not a mandatory requirement for *full obligation and expenditure* up to the authorization figure in each of the three fiscal years * * * 118 Cong. Rec. H. 9123 (Daily ed. Oct. 4, 1972) (Emphasis added.)

From the above exchange, it is clear that any discretion of the Administrator regarding the authorized funds was intended to be exercised only at the *obligation and expenditure stage and not at the allotment stage.*

Congressman Harsha noted the recent impoundments of highway funds (*after allotment*) by the executive branch.

[T]he Committee on Public Works is acutely aware that moneys from the highway trust fund have been impounded by the Executive. Expenditures from the highway trust fund are made in accordance with similar contract authority provisions to those in this bill. Obviously, *expenditures and appropriations* in the water pollution control bill could also be controlled. However, there is even more flexibility in this water pollution control bill because we have

added "not to exceed" in Section 207, as I indicated before.

Surely, if the Administration can impound moneys from the highway trust fund which does not have the flexibility of the language of the water pollution control bill, it can just as *rightly control expenditures from the contract authority produced in this legislation by that same means.* 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972) Emphasis added.)

However, the court in the *New York* case, *supra*, at 678 pointed out:

> * * * The impoundments of Federal-Aid Highway Act moneys referred to by Congressman Harsha were of funds allotted, i.e., *the controls were being exercised at the obligation level rather than at the allotment level.* (Emphasis added.)

Significantly, the very highway impoundments referred to by Congressman Harsha were declared to be illegal by the court in *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (9th Cir., 1973). Furthermore, Congressman Harsha followed his impoundment comments by noting that the Administrator may exercise discretion at a later point in time solely as it related to approval of plans, specifications and estimates.

> * * * I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications and estimates. *This is the pacing item in the expenditures of funds. It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures.* 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972) (Emphasis added.)

On the Senate side, the main spokesman for the Act was Senator Edmund Muskie. Senator Muskie at that time was Chairman of the Senate Subcommittee on Air and Water Pollution, which reported out the Senate version of the Act. He was also a floor manager of the bill and a member of the conference committee. Senator Muskie, in a specific reference to the amendments proposed by Congressman Harsha, made it clear to the Senate that the meaning of the Act is as contended herein

> Under the amendments proposed by Congressman William Harsha and others, the *authorizations for obligational authority* are "not to exceed" $18 billion over the next 3 years. Also "all" sums authorized to be obligated *need not be committed, though they must be allocated.* These two provisions were suggested to give the administration *some flexibility concerning the obligation of construction grant funds.* 118 Cong. Rec S 16871 (Daily ed. Oct. 4, 1972) (Emphasis added.)

The President also understood that Congress intended the full allotment of funds for in his veto message he stated:

> Certain provisions of * * * [the bill] confer a measure of *spending discretion and flexibility* upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.
>
> But the law would still exact an unfair and unnecessary price from the public. For I am convinced * * * that the pressure for full funding this bill would be so intense that funds approaching the *maximum authorized* amount could ultimately be claimed and paid out, no

> matter what technical controls the bill appears to grant the Executive. 118 Cong. Rec. H. 10266 (Daily ed. Oct. 18, 1972) (Emphasis added.)

It is significant that the President, in *vetoing* the bill, actually assumed an interpretation of the Act contrary to that subsequently taken in impounding the funds. The President initially assumed the existence of discretion only at the *spending* level; however, after the veto was overridden the President assumed the right to impound at the earlier stage of *allotment*. The fact that the President originally interpreted the Act in the same manner as is herein contended, constitutes a compelling argument against the subsequent, contrary interpretation taken by the President. Presumably, the President concluded that he would be under pressure to spend more than he wanted to unless be impounded at the allotment stage. The President and the Administrator are therefore seeking to do indirectly what the President originally recognized he could not be directly.

Congressman Harsha emphasized the need for advance planning and assured availability of funds in these words:

> Because of the magnitude of this program, it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants, including the sale of bonds that they have to sometimes negotiate.
>
> Now, *this can only be accomplished it there is assured availability of Federal grant funds for future years.* This necessary assurance is

not provided by merely advancing appropriations for 1 year. That will not meet the needed assurance of long-term planning. This is a continuing program.

The construction of a waste treatment plant consists of planning; economic and engineering feasibility studies; preliminary engitions, and estimates; the acquisition of land where appropriate, and the actual physical construction of the building itself. Under this legislation each one of these steps is ordinarily a separae project, a separate contract, and it is funded as completed or as work progresses. This is not the case under existing law where 25 percent of the total project must be completed before any payment can be made.

At the time any one of these preliminary steps is taken, such as the plans, specifications, and estimates, there is no assurance that appropriated funds would be available for subsequent projects for land acquisition and the actual building of this plant for which the plans, specifications, and estimates are being prepaerd. This, therefore, makes the orderly continuous planning and scheduling of work impossible. 118 Cong. Rec. H. 2727, H. 2728 (Daily ed. Mar. 29, 1972) (Emphasis added.)

Senator Muskie presented similar prevailing arguments in the Senate.[6]

As noted by the court in the *New York City* case, *supra*, at 674:

> The seriousness of the planning problem was understood by Congress. It was one of the reasons for utilizing the device of allotment, thereby making funds available for obligation [by contract authority], in lieu of the ordinary appropriations procedure.

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[6] 117 Cong. Rec. S. 17445 (Daily ed. Nov. 2, 1971).

It does not make sense to assume that Congress established the allotment and contract authority funding mechanism to correct the vagaries of the annual appropriation process, and coincidently grant the Administrator discretion to undercut its commitment by reintroducing the uncertainties of the old system back into the process. The intended firm commitment of Congress vanishes with any exercise of discretion by the Administrator *at the allotment stage*. Thus if the funding provisions are to have any meaning at all, it must be concluded that Congress did not intend the sums authorized for allotment to be altered at the whim of the Administrator.

Senator Muskie asked the Senate the following crucial questions regarding the high costs of attaining clean water and then gave the following answers:

> Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make possible life on this planet? Can we afford life itself? Those questions were never asked as we destroyed the waters of our nation, and they deserve no answers as we finally move to restore and renew them. These questions answer themselves. And those who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this crisis.
>
> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the Federal Government in 75% grants to municipalities during fiscal years

> 1973-75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation. 118 Cong. Rec. S. 16870 (Daily ed. Oct. 4, 1972.)

When the language of Sections 205 and 207 are analyzed in context of the whole Act and its legislative history, the inevitable conclusion is that the Administrator must allot the full sums authorized by Congress. It is inconceivable that Congress intended to grant the Administrator unfettered discretion at the allotment stage which in effect makes the Act a series of empty promises.

Even if the Administrator had any discretion, which he did not, he nonetheless has abused whatever discretion he may have possessed by his refusal to allot over one-half of the funds authorized by Congress to construct publicly owned treatment works. The broad objection of the Act, its goals, policies, effluent limitation deadlines, enforcement provisions, have been completely ignored by the Administrator.

The position of the amici curiae is further supported with compelling effect by a memorandum authorized by Justice William Rehnquist when he was serving as an Assistant Attorney General in the Office of Legal Counsel of the Department of Justice. The memorandum was addressed to the Deputy Counsel to the President and concerned the President's authority to impound funds appropriated for aid to federally impacted schools. It reads in part as follows:

> With respect to the suggestion that the

President has a *constitutional power to decline to spend* appropriated funds, *we must conclude that existence of such a broad power is supported by neither reason nor precedent.* There is, of course, no question that an appropriation act permits but does not require the executive branch to spend funds. (See 42 Ops. A.G. No. 32, p. 4 (1967)). *But this is basically a rule of construction*, and does not meet the question whether the President *has authority to refuse to spend where* the appropriation act *or the substantive legislation, fairly construed, require such action.*

Although there is no judicial precedent squarely in point, *Kendall v. United States*, 12 Pet. 524 (1838), appears to be authority against the Presidential power. In that case it was held that mandamus lay to compel the Postmaster General to pay to a contractor an award which had been arrived at in accordance with a procedure directed by Congress for settling the case. [T]he mere fact that a duty may be described as discretionary does not, in our view, make the principle of the *Kendall* case inapplicable, if the action of the federal officer is beyond the bounds of discretion permitted him by the law. 119 Cong. Rec. S 3808 (Daily ed. March 1, 1973 (Emphasis added.)

CONCLUSION

From the foregoing, the amici curiae contend there is no statutory basis or justification for the Administrator to thwart the declared priorities and policies of Congress provided in the Federal Water Pollution Control Act Amendments of 1972. The amici curiae therefore request this court declare invalid the Administrator's action in refusing to allot the full amount of the authorized funds to the states to implement the construction grant program of the 1972 Act.

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